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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

FLORIDA FRUIT & VEGETABLE ASSOCIATION, UNITED STATES SUGAR CORPORATION and SOUTH BAY GROWERS, INC.,
Petitioners,

vs.

WILLIAM E. BROCK, SECRETARY, DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, JOSE J. RAMIREZ, FRANCISCO RUIZ, and ANICETO CARRIZALES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW DECIDED IN CONFLICT WITH APPLICABLE DECISIONS AND CALLING FOR SUPERVISION

Do the Courts below establish erroneous precedent, in conflict with applicable decisions of this Court and fail to meet their obligation under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), when they affirm Department of Labor ("DOL") action, without permitting a trial or other opportunity to establish facts asserted by Petitioners, even though during the rulemaking, both the Petitioners' expert and the United States Department of Agriculture's expert in statistical methodology and agricultural economics had demonstrated that:

(1) average annual earnings data which DOL inserted in established hourly wage formula to index hourly wage changes had no validity under statistical and economic theory and methodology;

(2) agency action adopted hurriedly, without expertise of any staff member with training in statistics, economics or even wage data collection sufficient to understand or address criticisms raised by Petitioners during rulemaking or to understand magnitude of DOL's error;

(3) all other "facts" DOL published to justify agency action were either false or nonsense, thus failing to confront fundamental flaws in DOL's rule.

LIST OF PARTIES TO PROCEEDING BELOW

Florida Fruit & Vegetable Association
Atlantic Sugar Association
Cane Contractors, Inc.
Okeelanta Corporation
Osceola Farms Company
Shawnee Farms
Sugar Cane Growers Cooperative of Florida
Sugar Cane Harvesting, Inc.
South Bay Growers, Inc.
United States Sugar Corporation
William E. Brock, Secretary, Department of Labor
United States Department of Labor
Jose J. Ramirez
Francisco Ruiz
Aniceto Carrizales

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPORTS OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, which adopts and reprints the decision of the United States District Court for the Southern District of Florida upholding the subject regulations in issue, is reported as *Florida Fruit & Vegetable Association v. Brock*, 771 F.2d 1455 (11th Cir. 1985), *reh' and reh' en banc denied.* The decision of the District Court

is officially reported as *Florida Fruit & Vegetable Association v. Donovan*, 583 F.Supp. 268 (S.D. Fla. 1984).[1]

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1985, and the Court denied a petition for rehearing and for rehearing en banc on November 1, 1985. This Petition is filed within ninety days of the latter date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This proceeding involves the following provisions of the Administrative Procedure Act, 5 U.S.C. §§ 553 and 706(2)(A) and of the United States Department of Labor's regulations at 20 C.F.R. § 655.207(b)(1).

5 U.S.C. § 553 Rulemaking:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall

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1. Growers in other parts of the country challenged DOL's new regulation on the same grounds asserted by Petitioners. In those two cases, the District Courts held for the growers. In both of those cases, however, the Courts of Appeal have held for the Department of Labor. Those two cases and their citations are as follows: *Virginia Agricultural Growers Association, Inc. v. Donovan*, 597 F.Supp. 45 (W.D. Va. 1984) ("*VAGA*") (App. C), *rev'd*, 774 F.2d 89 (4th Cir. 1985) and *Shoreham Cooperative Apple Producers Association, Inc. v. Donovan*, C.A. No. 83-326 (D. Vt. 1984) (unreported), *rev'd*, 764 F.2d 135 (2d Cir. 1985).

incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

5 U.S.C. § 706 Scope of Review:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The specific regulation in issue was published at 48 Fed. Reg. 40,168, 40,175 (Sept. 2, 1983), (to be codified at 20 C.F.R. § 655.207(b)(1)). It provides:

For agricultural employment (except sheepherding) in the states listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the year previous), in the ES-202 report's aggregate average weekly wage rates for the appropriate group of agricultural workers. The appropriate

> group of workers shall be those U.S. agricultural workers employed by establishments in Standard Industrial Classification (SIC) Code Nos. 013, 016, 017, 019, 071, and 072 within that State (except that for purposes of wage movement, but not actual adverse effect rates, New York, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont shall be considered as one State, and Maryland, Virginia, and West Virginia shall be considered as one State). The Administrator shall publish, in each calendar year, on a date he shall determine, adverse effect rates calculated pursuant to this paragraph (b) as a notice in the *Federal Register*.

The prior regulation provision at 20 C.F.R. § 655.207(b)(1), published at 43 Fed. Reg. 10,306, 10,317 (March 10, 1978), provided:

> For agricultural employment in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's average effect rate by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture farm wage rates for agricultural workers. The Administrator shall annually publish adverse effect rates calculated pursuant to this paragraph as a notice in the Federal Register.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

This case challenges an informal rulemaking by the United States Department of Labor, Employment Training Administration ("DOL" or "ETA") under the Administra-

tive Procedure Act, 5 U.S.C. §§ 553 and 706(2)(A). The District Court thus had jurisdiction over this action seeking declaratory and injunctive relief pursuant 28 U.S.C. §§ 1331 and 1337.

The Petitioners, all of whom are Florida growers (hereinafter "Growers") annually import temporary foreign harvest workers under what is known as the "H-2" program. The program is statutorily authorized by the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(15)(H)(ii) (hence "H-2") and 1184(c). The Immigration and Naturalization Service has promulgated a regulation pursuant to the INA at 8 C.F.R. § 214(2)(h)(3)(ii). Pursuant to this regulation, the Secretary of the United States Department of Labor makes factual findings concerning the availability or unavailability of U.S. workers to perform the subject work. He also establishes the terms and conditions of employment, including wages, which must be paid to both U.S. and foreign workers in order to avoid adverse effect on similarly employed U.S. workers. These DOL regulations are published at 20 C.F.R. §§ 655.0, .00 and .200-.12.

H-2 Growers must thus pay foreign and U.S. workers at least the DOL-set hourly "adverse effect wage rate" ("AEWR"). *See* 20 C.F.R. §§ 655.200(b) (definition of "adverse effect rate") and 655.202(b)(9). *See also Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299 (5th Cir. 1976), and *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976), which describe the operation of the H-2 program.

Pursuant to Regulations noticed and published in the Federal Register, for the 15 years from 1968 until 1983, DOL annually adjusted or indexed each year's AEWR by the percentage change in average hourly wage rates for

field and livestock workers in a state or region from the second previous year to the immediate prior year, as determined by the United States Department of Agriculture ("USDA") Quarterly Farm Labor Survey. *See* 41 Fed. Reg. 25,017, 25,018 (June 22, 1976), and 43 Fed. Reg. 10,306, 10,310, 10,317 (March 10, 1978).

In early 1981, USDA announced that budgetary cutbacks would force discontinuation of its Quarterly Farm Labor Survey, and it substituted an annual survey conducted in July, the peak period of farm employment nationwide. DOL did nothing to begin accommodating its annual AEWR process to this change, except that for 1982 it performed a statistical calculation to ascertain the historical relationship between July wages and annual wages as shown by the full four quarter survey. It established 1982 AEWRs using this statistical adjustment to the USDA data. 48 Fed. Reg. 232-35 (January 4, 1983).

After two years of dilatory action and two orders from the United States District Court for the District of Columbia,[2] DOL issued the AEWR methodology here in controversy.

ES-202 Program Data Hurriedly Adopted

In 1983 DOL sought to change the AEWR data base to be inserted in the long-used indexing formula; it did not, however, seek to change the hourly wage-based AEWR formula itself. *See* 48 Fed. Reg. 33,684-92 (July 22, 1983) (proposed) and 48 Fed. Reg. 40,168-75 (Sept. 2, 1983) (adopted). The only change made in 20 C.F.R. § 655.207 (b)(1) was of what data base would be used in the

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2. *Bragg v. Donovan*, No. 82-2361 (D.D.C. 1982) and *NAACP, Jefferson County Branch v. Donovan*, 566 F.Supp. 1202 (D.D.C. 1983).

formula to measure year-to-year changes in average hourly wages of farmworkers employed similarly to H-2 workers. It rejected statistical adjustment of the USDA data, failed to consider using any other data and adopted use of ES-202 data.

DOL would index each year's AEWR by the percentage change from one year to the next in the annual "average weekly earnings" statistic derived from ES-202 program data. These data are collected by the Bureau of Labor Statistics ("BLS"), a constituent agency of DOL and by the State Employment Security Agencies. Outcries from Growers around the country forced DOL to extend its original 14-day comment period to 31 days; DOL was nonetheless able to publish its final rule just 7 working days after the end of the comment period. It had received 206 comments. Virtually all of the comments which dealt with the proposed AEWR methodology criticized the ES-202 data as being totally inappropriate for the use proposed.

The entire administrative record was made a part of the record in the District Court. In neither its proposal, in its final comments, nor in any other place did DOL ever cite any report, study or other analysis justifying or even explaining why it chose to select the ES-202 data. DOL's ETA staff who adopted the AEWR rule never even consulted with BLS staff to determine if the ES-202 data were suitable for this purpose. ETA had no expert economists or statisticians on its own staff.

All Expert Opinions Against ES-202 Usage

During the comment period the Growers submitted a 41-page report prepared by Dr. James S. Holt, a full-time agricultural economist and statistician. Holt, "A Critique

of the Proposed ES-202 Based Adverse Effect Wage Rate Methodology and 1983 Adverse Effect Wage Rates," (August 16, 1983) (attached as Exhibit to Comment by Florida Fruit & Vegetable Association) (Administrative Record Doc. No. 178) ("Holt Report"). Dr. Holt analyzed the ES-202 data in detail and concluded that it was an absolutely inappropriate data base for indexing the AEWR.

Secretary of Agriculture John R. Block also submitted a comment urging DOL not to adopt the ES-202 data, which was prepared by Dr. Robert I. Coltrane, a professional economist and statistician and the head of USDA's research on rural labor markets. Secretary of Agriculture John R. Block's comment (Administrative Record Doc. No. 203) ("Coltrane Letter").

Dr. Coltrane also concluded that ES-202 data "is not statistically reliable" as a basis for indexing changes in the AEWR. Coltrane Letter at 2.

A One-Sided Debate: DOL Responses Failed to Address Holt and Coltrane Criticisms of Data

As noted above, DOL had no study or other analysis upon which its idea to insert the ES-202 data into the existing AEWR formula was based; the only analysis and rationale upon which DOL's action must stand or fall is that which is contained in the two Federal Register notices. A comparison of DOL's effort to respond to criticisms at 48 Fed. Reg. 40,170-72 (Sept. 2, 1983) with the serious, substantive and expert criticisms leveled by Drs. Holt and Coltrane demonstrates that DOL's decision was not based on consideration of the relevant factors. DOL never articulated a rational connection between the facts in the record and the choice it made, particularly in view of the fact that, in adopting the ES-202 data, it departed from a

practice of some 15 years' standing. It shows that DOL engaged in a clear error of judgment; there was no rational basis for the conclusion it reached in light of the entire record.

What USDA Data and ES-202 Data Are

The data on which the formula was based until 1983 were the actual *hourly* wages of field and livestock workers ascertained through a USDA survey.

ES-202 data are *not* hourly wage data. BLS obtains the ES-202 source data from the state employment service agencies, which obtain reports from those agricultural employers whose employees are covered by unemployment compensation. While the exact coverage varies from state to state, only the largest 8% agricultural employers file these reports. Only a minority of farmworkers are employed by these large employers. The data collected are, for this limited group of employers, the number of employees on the payroll one week in each month and the payroll for all 52 weeks of the year. Dividing average employee head count into payroll for the entire year is how the "average weekly earnings" statistic is ascertained. This figure is, however, a "statistical artifact." In statistical terminology, this means that the number derived is a meaningless number. As Dr. Coltrane showed DOL:

> In fact, the calculation of the average weekly wage is based on the number of employees working only in three weeks of each calendar quarter, while the payroll data are for the entire quarter. Thus, the data for workers and payroll are not at all comparable for determining a weekly wage . . . . [A]n average weekly wage is an inappropriate indicator of hourly wage rates.

Coltrane Letter at 3, Para. 3. Dr. Holt showed DOL the same fundamental methodological flaw. Holt Report at 22. Variation in employment levels during the selected weeks can affect the assumed individual average weekly wage. When the average weekly wage is then used to assume average hourly rates, DOL has made further unsupported leaps of logic and faith, which the only expert economists and statisticians involved in this proceeding showed DOL were utterly, absolutely, unequivocally erroneous.

DOL ignored both Dr. Holt's and Dr. Coltrane's explanations that it was in effect dividing apples into oranges, getting a number, but obtaining a number which was meaningless. Perhaps DOL simply lacked the expertise to understand the nature of the problem presented, but the result is the same, however benign the motivation. DOL neither dealt with nor responded to this very fundamental criticism of using the ES-202 data to index assumed changes in earnings, much less changes in an hourly wage-based formula.

Dr. Holt predicted that substantial and erratic fluctuations from year to year would occur in AEWR's indexed on ES-202 data. After the comment period, when data could finally be obtained from BLS, Dr. Holt tested how the ES-202 methodology would have changed AEWRs over several earlier years. In some states, the variation from year to year would be as much as 70%, hardly the way real earnings or wages change.

	1978-79	1979-80	1980-81	1981-82
Georgia	+71.3%	+ 1.0%	+23.0%	- 5.6%
Nebraska	+72.2%	+30.8%	-20.9%	+20.9%

Dr. Holt concluded, "this table shows such erratic patterns of change that it cannot be plausibly argued that these annual changes bear any relation to real annual changes in hourly wages." Holt Affidavit at 5. DOL's response was that in some states the AEWR produced by USDA data was higher than the AEWR produced by the ES-202 data for those states. 48 Fed. Reg. at 40,170. This is no response at all.

DOL simply missed the Growers' point. The issue is not which AEWR is higher; it is which AEWR is reasonable, i.e., which is a reasonable reflection of actual changes in hourly compensation rates. Throughout this dispute, DOL has repeatedly stressed the volume of ES-202 data, *e.g.*, an employee headcount every month to include all time periods when H-2 workers are employed; it consistently ignored criticisms that ES-202 "average weekly earnings" data measures either nothing at all or the wrong thing.

BLS Does Not Use ES-202 Data As Hourly Wage Data

Because, as indicated above, ES-202 data is not an appropriate basis for determining hourly wage rates, when BLS itself wishes to ascertain hourly wage rate information, it conducts a separate study. This is known as the "BLS-790" program. The sample of employers from which BLS-790 data is collected is a sample of those from which ES-202 data is collected, with one very important exception. BLS considers the data sample for agriculture so unreliable that it does not even conduct the BLS-790 program among agricultural employers.

Like the USDA wage study on which the AEWR was previously indexed, the BLS-790 program selects a statistically representative sample of industrial employers

and asks those employers how much they paid production workers in a specific workweek and how many hours those production workers worked in that particular week. *See* the BLS summary of its programs included as an attachment to the DOL proposal, 48 Fed. Reg. at 33,691.

As BSL pointed out, but DOL's non-expert ETA group making this rule apparently failed to understand, "the 790 program differs from ES-202 in that it provides hourly earnings for production (non-supervisory) workers only whereas ES-202 provides total payroll for all employees, unrelated to hours." *Id.*

Dr. Holt's report showed examples in which ES-202 "average weekly earnings" data did not move proportionately or even in the same direction as average *hourly* wage results, as determined from the 790 study of industrial SIC codes where both 790 data and ES-202 data are available. DOL also ignored this criticism in its final rule.

ES-202 Data Not Used by Other Agencies As DOL Claimed in Its Proposal

Since nearly every non-agricultural employer which has employees must file a quarterly ES-202 unemployment compensation report showing total quarterly payroll and number of employees employed for three weeks during the quarter, ES-202 data is a source showing, for each industrial SIC code and state (a) the total number of employers, (b) the number of employees and (c) annual payroll. In its proposal, DOL claimed that "the broad universe coverage, continuity and currency [a word which means 'usage'] of the ES-202 program make its data one of the most useful data bases for determining wage movements in all United States industries." 48 Fed. Reg. at 33,685. DOL then cited five agencies which it claimed used the data.

In so doing, DOL's ETA personnel did not consult with their colleagues in BLS. DOL simply lifted statements, without review by any expert statisticians or consultation with other agencies, from a BLS publication, a portion of which was republished as part of the proposed DOL regulation. 48 Fed. Reg. at 33,688-92.

Dr. Holt's report addressed each claimed use and pointed out that these cited uses not only do not support DOL action, but:

> serve to cast additional doubt on the appropriateness of the ES-202 statistics in the proposed use. *In every cited use when agricultural ES-202 statistics might potentially be appropriate, they are specifically excluded.*

Holt Report at 29 (emphasis in original). Dr. Coltrane's Letter also pointed out the same flaw. Coltrane Letter at 2-3.

To summarize, no agency uses the "average weekly earnings" statistics derived from the ES-202 data. Most agencies reject the agricultural component of ES-202 data altogether. No agency uses ES-202 data to index or to in any way determine changes in hourly wages or earnings.

DOL's response to these criticisms that the cited uses of ES-202 data were all very different from what DOL proposed to do with it was, "this demonstrates the versatility of the data series." This contention is preposterous in light of DOL's earlier, but erroneous, claim that comparable uses supported its use of the data. 48 Fed. Reg. at 40,171. DOL concluded:

> When unemployment compensation coverage of agricultural workers will be [sic] in place for more years,

> it is expected that the use of the ES-202 data on their earnings will achieve greater utilization for governmental and private statistical purposes.

Id. Is DOL simply saying that it does not matter that no one else, including BLS itself, uses the ES-202 data for hourly wage purposes or even believes that such data can be appropriate for such use?

ES-202 Measures, if Anything, Changes in Annual Earnings Which Particularly in Agriculture Are Not Related to Changes in Hourly Wages

DOL admits that the ES-202 program contains no source data on manhours or manweeks worked. If ES-202 data measures anything, it measures changes in annual earnings. Dividing the average number of employees into the gross annual payroll produces average annual earnings. Even if each year's average annual earnings figure is divided by 52 to obtain "average weekly earnings," any apparent change in "average weekly earnings" from year to year results from changes in gross annual earnings.

Dr. Holt showed DOL that changes in annual earnings can and commonly do occur in agriculture for reasons which are totally unrelated to changes in hourly compensation rates. These reasons include variations in crop size, in the length of the workweek, in the length of the season, variations in productivity, weather conditions affecting availability of work, changes in the labor supply and/or labor management practices, and changes in the composition in the agricultural workforce. Holt Report at 18-23.

ES-202 data are "conceptually inappropriate" to measure year to year changes in hourly wage rates. Year to year changes in the annual earnings of seasonal agricul-

tural workers are more likely to be influenced by changes in the amount of employment available than by actual changes in hourly wage rates. *Id.* *See also* Coltrane Letter at 3.

In its comments, DOL either missed the point entirely or ignored it; there is no response to the conceptual problem of adjusting hourly wage rates by changes in annual earnings. DOL's only response was to philosophize that "[i]t is anticipated that these factors would cancel each other out, that poor crop years would be followed by better crop years . . . and that over time productivity and earnings would change at a steady rate." 48 Fed. Reg. at 40,170. DOL in effect said that big (and wrong) changes in AEWRs for workers and employers in certain states would be balanced out by small (and wrong) changes in AEWRs for workers and employers in other states and that in the end all of this would balance out. Is this not per se irrational and nonsensical where on an annual basis the AEWR should be, according to DOL Part 655 regulations, adjusted to reflect wage changes for similarly employed workers in a particular state or region?

DOL made no analysis of the effects of ES-202 AEWRs and had no analytical basis to predict "cancelling out" of these radical fluctuations of time. Moreover, the fact that an erroneously high or low AEWR one year may be followed by an erroneously low or high AEWR the following year fails to address either the Growers' or the workers' problems with this methodology.

ES-202 Data Include Only Data from Largest Employers

Dr. Holt pointed out that employment insurance requirements cover only the nation's 4-8% largest employers

and a minority of farm employees. Dr. Holt cited a prior statistical study he had performed for the USDA which showed that these larger employers pay their workers higher hourly wages and provide them steadier employment than do smaller employers. *See* Holt Report at 13-14.

ES-202 Data Not Based on "Similarly Employed" Workers

Dr. Holt further pointed out that ES-202 data include all employees of the reporting employers—from the president to janitor, including all clerical employees, supervisors, crop duster pilots, equipment operators and other specialists—full time workers as well as part-time workers. ES-202 data also include these large farmers' non-agricultural enterprises. Dr. Holt estimated that up to 25% of all employees in the ES-202/AEWR data base are not agricultural workers at all.

Thus, the ES-202 data do not measure wage movements among workers who are in fact "similarly employed" to H-2 workers as is required by the applicable INS regulation, 8 C.F.R. § 214.2(h)(3) and by DOL's own definition of the AEWR, 20 C.F.R. § 655.200(b).

In 1978 AEWR rulemaking, DOL had rejected use of USDA's piece rate wage data because of its "inclusion of Packing House Workers, Machine Operators, and Supervisors . . . who were not similarly employed to the field workers." 43 Fed. Reg. 10,310 (March 10, 1978). DOL's response to this comment was merely:

> DOL has not been persuaded that the wages of non-production workers in agriculture rise or fall at any significantly different rate than the wages of production workers in agriculture. Similarly, DOL has not

> been persuaded that the wages of workers covered by unemployment compensation (and the ES-202 program) rise or fall at any significantly different rate than the wages of workers not covered.

48 Fed. Reg. at 40,171. DOL's conclusion is out of thin air. There is nothing in the record to demonstrate that DOL conducted any study or relied on any existing data to reach this conclusion.

ES-202 Data Not Subject to Adequate Quality Controls

While the ES-202 report is a mandatory tax return for those covered, neither the employee head count nor the gross payroll data are part of the taxing system. Thus, the correctness of this data has a low priority among state employment compensation officials who collect it. Holt Report at 20. Moreover, while BLS prescribes procedures for classification and correlating data, it does not have effective control or financial resources to insure that states meet those standards.

While investigating the reason for a 57% AEWR increase for the State of Colorado, Dr. Holt found in data not supplied him until after the comment period had closed and the regulation been issued, that Colorado had submitted estimated data which was not marked as "estimated" on BLS records. Holt Affidavit at 5.

As an indication of how unreliable this data is, the Health Care Financing Administration, part of the Department of Health and Human Services, uses ES-202 data from the hospital SIC classification to measure differentials in labor costs among geographic areas. Because ES-202 data is so unreliable, even for this purpose, this agency funds three full time positions at BLS to work on data quality control for this single SIC classification. Despite

this extra editing, the agency will not use this data on nursing homes at all. *See* Holt Report at 19-20.

If the Federal government does not trust ES-202 data for indexing its own payments, may it rationally use the same data from agricultural employers for which the collection sample, etc. are even more unreliable, to index AEWR wage payments of millions of dollars by the Growers?

ES-202 Data Produce Untimely AEWRS

ES-202 data is frequently late in being received from the states, and BLS is often late in its tabulation and publication of ES-202 data. The 1979 data was not published until 1983. Holt Report at 21. In the final rule, DOL acceded to Growers' demand that wage increases not be double counted for the same year as proposed. The final rule provides that the changes will be measured based on the immediate prior year and the next preceeding prior year. DOL failed to consider the fact that BLS does not have ES-202 statistics for a calendar year available until approximately mid-September of the following year. *See Virginia Agricultural Growers Association, Inc. v. Donovan,* 597 F.Supp. 45, 54 (W.D. Va. 1984) (App. C).

An AEWR not published until September is far too late to satisfy the purpose for which the AEWR is used. Recruitment for U.S. workers, in order to determine their availability, must according to regulation begin 80 days prior to the date when workers are actually needed. 20 C.F.R. § 655.201(c).

Adopting a data base which will not be available until after recruitment of U.S. workers for most H-2 jobs has been completed does not satisfy the INA statutory man-

date to determine the availability of U.S. workers at current prevailing wage rates. The DOL-ETA staff adopting this rule apparently did not know enough about the ES-202 program to foresee this very significant problem, and it is not dealt with at all in the final rule and comments.

No Consideration of Other AEWR Alternatives

While the Growers and USDA Secretary Block urged DOL to use the annual USDA farm labor hourly wage rate survey, with a statistical adjustment as it had done the preceding year, this was not the only choice available to DOL. DOL could have used prevailing wage rate survey data; each year DOL-ETA itself conducts thousands of prevailing rate surveys to determine what wages must be paid to temporary and permanent workers in non-agricultural positions. *See* 20 C.F.R. § 656.24(b)(3). DOL could conduct its own stratified random sample of employees in affected states working in the affected crops.

While DOL acknowledged considerable limitation on the appropriateness of using ES-202 for indexing AEWRs, it is also clear that DOL failed to consider alternatives available to it despite more than two years of delay and a court imposed deadline months before it finally decided to act. When DOL did act, it quickly published and adopted a proposal, brushing aside all criticisms and defects, without having studied availability of other alternatives. Such action, the Growers urge, does not constitute consideration of "all relevant factors" and is therefore a clear error of judgment.

History of Litigation

Upon DOL's adoption of the ES-202 data for insertion in the existing formula, the Growers filed a complaint for

a declaratory and injunctive relief. In response DOL submitted what it said was the entire administrative record on which it relied. DOL moved for summary judgment seeking to hold the rule valid. Believing that the stipulated administration record was insufficient to satisfy APA requirements for a valid rulemaking, the Growers cross-moved for summary judgment. Alternatively, the Growers asked for a trial to resolve factual disputes raised by their comments which, they urged pursuant to Fed. R. Civ. P. 56, established genuine dispute over material facts as to whether DOL had adequately analyzed, studied, explained and justified the rational basis for the rule.

Refusing to permit a trial, the District Court held that DOL was entitled to deference in setting rates, deference in the choice of data to be relied upon and broad discretion in choosing among reasonable formula. It granted summary judgment, upholding the validity of the AEWR rule on the administrative record submitted by DOL. While the Court denied the Growers' request for an evidentiary hearing, it also implicitly acknowledged that the Growers had indeed raised serious questions which were inadequately addressed by DOL.

> It is inappropriate for the Court to substitute its judgment for that of the Secretary when faced with such conflicting facts and opinions.

Florida Fruit & Vegetable Association v. Brock, 771 F.2d 1455 (11th Cir. 1985), *reh' and reh' en banc denied, aff'g, sub nom., Florida Fruit & Vegetable Association v. Donovan*, 583 F.Supp. 268, 273 (S.D. Fla. 1984) (App. B).

On appeal, the Growers urged the Court to find that Growers had raised significant factual and technical objections to the use of ES-202 data for the AEWR methodology and that the administrative rulemaking record which contains no studies, analyses or memoranda adequately re-

sponding to Growers' objections, is insufficient to satisfy APA requirements for rulemaking under 5 U.S.C. § 553. They urged the rule should be set aside pursuant to 5 U.S.C. § 706(2)(A). Alternatively, the Growers asked the Court of Appeals to direct the district court to hold an evidentiary hearing to permit them to prove their critical comments which they urged would show DOL's total lack of study, analysis or even understanding of the criticisms which showed the defectiveness, inappropriateness and irrationality of using ES-202 data for insertion in the formula. The Court of Appeals rejected the Growers' contentions and adopted the decision of the district court.

District Courts in Related Cases Correctly Ruled Against DOL

In the two other cases filed on the AEWR data base methodology change, the District Courts found the DOL rule did not meet the APA requirements, and the Courts of Appeal reversed both district courts. *Virginia Agricultural Growers Association, Inc. v. Donovan,* 597 F.Supp. 45 (W.D. Va. 1984) ("*VAGA*") (App. C), *rev'd,* 774 F.2d 89 (4th Cir. 1985); *Shoreham Cooperative Apple Producers Association, Inc. v. Donovan,* C.A. No. 83-326 (D. Vt. 1984), *rev'd,* 764 F.2d 135 (1985).

The *VAGA* District Court held a hearing in order to obtain background information so that it could better ascertain whether the DOL had considered all of the relevant factors or explicated adequately its course of conduct or grounds of decision. *VAGA,* 597 F.Supp. at 50, *citing ASARCO, Inc. v. EPA,* 616 F.2d 1153, 1160 (9th Cir. 1980). Although the *VAGA* Court explicitly noted it was not making a "*de novo* review" of the action, Judge Kiser held:

> [T]here is simply no evidence in the administrative record . . . that DOL tested this methodology against

> others and studied its consequences and effects. The ES-202 methodology was simply published, and there is just not one iota of information in the record which clearly and adequately discloses the grounds upon which DOL acted in selecting the methodology. The paucity of any reasoning and support of the ES-202 methodology over some alternatives indicates to me that DOL had chosen this methodology prior to receiving public comment to satisfy the Court's order in the *NAACP* case and that the public comment process was simply a formalistic exercise.

VAGA, 597 F.Supp. at 51-52 (App. C). He also found:

> The [administrative] record as it stands contains no studies, no analysis, no memoranda, and no empirical evaluation of the ES-202 methodology, or any other methodology studied by DOL. In short, I cannot determine why DOL chose this method.

Id. 597 F.Supp. at 51 (App. C). He continued:

> Cursory response to comments which point out glaring deficiencies in this data series as a measure of the AEWR does not comply with DOL's responsibility to consider and respond to such comments. The fact is, DOL was under the gun of Judge Richey's court order, selected this methodology with no indication in the administrative record as to how it was selected and was going to publish this as a final rule regardless of what the commenters submitted. Such action in my opinion is arbitrary and capricious, and the regulation must be overturned.

Id. 597 F.Supp. at 55 (App. C). The other District Court, which actually examined what DOL said rather than just accept the conclusions DOL asserted, also ruled against DOL.

> Unfortunately, we find it impossible to determine from the record whether or not the agency considered all the relevant factors in determining the AEWR. The record is devoid of any indication as to what data or analyses were relied on by the Secretary. . . . The absence of evidence in the record which might reasonably have been used to support the Secretary's decision with respect to the ES-202 data methodology requires us to look outside the record in order to determine whether or not the Secretary's decision had a rational basis. *See also Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (*per curiam*) (an exception to the general rule limiting review to the agency record arises where the agency insufficiently explains its actions so as to frustrate judicial review).

Shoreham, C.A. No. 83-326 at 9-10.

Courts of Appeal Recited Liturgy Without Analysis

The Growers respectfully urge that in holding the ES-202 data appropriate for insertion in the AEWR formula, the three Courts of Appeal which have examined the issue have recited applicable Supreme Court law as though it were a liturgy, without understanding or properly applying the direction of this Court.

REASONS FOR GRANTING WRIT

1. The Decisions Below Are in Conflict with This Court's Admonishments That Administrative Record Must Contain Rational Basis and Explanation for Agency Action.

As stated by this Court, a reviewing court must be able to ascertain if agency action is "based on consideration of the relevant factors," and whether the decision is "supported by substantial evidence" on the record considered as a whole. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-44 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

These cases demand that the reviewing court must engage in a substantial inquiry into the facts; the review must be a "searching and careful" probe to ascertain that all relevant facts have been considered and that there is no clear error of judgment. *Overton Park*, 401 U.S. at 415-16. Even in matters over which an agency may exercise discretion, "an agency must cogently explain why it has exercised its discretion in a given manner. . . ." *Motor Vehicle Manufacturers*, 463 U.S. at 48-49. The Growers urge the undisputed facts in the administrative record show DOL's ES-202 regulation does not meet these requirements.

As noted by this Court previously, "[i]f Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Manufacturers*, 463 U.S. at 49 (emphasis in original).

In this case the Courts below demanded deference, however, and without allowing a trial or other evidentiary opportunity for the Growers to controvert DOL's claims, they held "[i]t is inappropriate for the Court to substitute its judgment for that of the Secretary when faced with such conflicting facts and opinions." *FFVA*, 583 F.Supp. at 273, *aff'd*, 771 F.2d at 460. (App. B).

The Growers therefore respectfully urge that this Court should exercise its supervisory role to reverse and hold that DOL's action invalid, or that at least it is inadequately supported, and to demonstrate the depth of required judicial scrutiny into complex technical matters which is required when such substantial issues are raised as in the case here.

2. Decisions Below Are in Conflict with This Court's Admonishments to Allow Challengers to Show Rule Not Properly Considered.

Despite acknowledging that there were substantial conflicts in the evidence, the District Court below nonetheless refused the Growers an opportunity for trial or other evidentiary proceeding in which they could present background evidence against which to evaluate the adequacy of the administrative record and consideration of the regulation.

DOL itself created a time crisis by its own failure to have acted earlier. Then it gave those affected by its action the legal equivalent of the "bum's rush" so that data upon which even more substantial criticisms against the rule could have been leveled, were not even available to the Growers during the comment period.

The Growers respectfully urge that they were entitled to have discovery and a hearing or trial to cross-examine

DOL's policymakers and to present other evidence, which was unavailable to them during the hastily conducted rulemaking proceeding, against which DOL's rationality for the rule should be evaluated.

Such proceedings are certainly in accord with *Overton Park* and how that case was handled on remand to the District Court. *Id.* 335 F.Supp. 873, 876-77 (W.D. Tenn. 1972) (*on remand*). The Growers respectfully urge that the rationale in *ASARCO, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980), which was adopted and applied by the District Court in *Virginia Agricultural Growers Association, Inc. v. Donovan*, 597 F.Supp. 45 (W.D. Va.), was proper and that the *VAGA* District Court decision is the proper result when the standards of this Court are properly applied.

CONCLUSION

No Court which has approved DOL's actions on this regulation has yet done so in a decision that probes beyond the superficial, non-explanatory DOL comments. The Growers respectfully urge that no Court could make such a probe and find DOL's actions justified. They urge this Court to issue a writ of certiorari so that the correct rule of law can be applied here, thus providing needed guidance to all those who promulgate administrative rules and to the Courts which must review their rationality.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed November 1, 1985)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5467

FLORIDA FRUIT & VEGETABLE ASSOCIATION
UNITED STATES SUGAR CORPORATION,
SOUTH BAY GROWERS, INC.,
Plaintiffs-Appellees,
Cross-Appellants,

versus

WILLIAM E. BROCK, Secretary, Dept. of Labor and
UNITED STATES DEPARTMENT OF LABOR,
Defendants-Cross-Appellees.

JOSE J. RAMIREZ, FRANCISCO RUIZ
and ANICETO CARRIZALES,
Defendants-Intervenors-Appellants,
Cross-Appellees.

Appeal From the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC**

(Opinion September 24, 11 Cir. 1985, ... F.2d .....).
(November 1, 1985)

Before VANCE and HATCHETT, Circuit Judges and ATKINS*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing APPELLEES-CROSS-APPELLANTS (FLORIDA) is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ B. Vance

United States Circuit Judge

APPENDIX B

FLORIDA FRUIT & VEGETABLE ASSOCIATION, United States Sugar Corporation, South Bay Growers, Inc., Plaintiffs-Appellees, Cross-Appellants,

v.

William E. BROCK, Secretary, Department of Labor and United States Department of Labor, Defendants-Cross-Appellees.

Jose J. Ramirez, Francisco Ruiz and Aniceto Carrizales, Defendants-Intervenors-Appellants, Cross-Appellees.

No. 84-5467.

United States Court of Appeals,
Eleventh Circuit.

Sept. 24, 1985.

Rehearing and Rehearing En Banc
Denied Nov. 1, 1985.

Florida fruit and vegetable association, which acted as agent of a number of Florida sugar cane growers in recruiting domestic cane cutters and in applying for certification under the applicable federal statutes and regulations for the admission of temporary foreign cane cutters, brought suit, along with others, against the United States Department of Labor and the Secretary thereof, seeking invalidation of federal regulations relating to adverse effect wage rates and piece rate adjustments. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., entered judgment upholding one regulation but invalidating another, and plaintiffs appealed. The Court of Appeals, adopting the opinion of the District Court, held that: (1) because the United States Depart-

ment of Labor and the Secretary thereof have broad discretion in setting adverse effect wage rates for agricultural workers, because the base AEWRs built up over several years prior to 1981 were reasonable, and because the DOL and its Secretary considered the relevant factors during rule-making proceeding, the 1983 AEWRs were rationally based and the decision to use ES-202 data was reasonable, particularly as compared to the use of USDA data; therefore, the AEWR regulation, 20 C.F.R. § 655.207(b), as amended on August 31, 1983, was not arbitrary and capricious, but (2) DOL's piece-rate regulation, 20 C.F.R. § 655.207(c), as amended on August 31, 1983, was invalid because DOL and its Secretary failed to provide adequate notice and opportunity to comment upon use of the adjective "U.S." in the regulation.

Affirmed.

1. Federal Civil Procedure (Key) 2464

Summary judgment procedure is particularly appropriate in cases in which court is asked to review decision of a federal administrative agency.

2. Federal Civil Procedure (Key) 2464

Summary judgment is appropriate where, in reviewing agency rule making, court considers record that was before agency, and that record is before the court.

3. Administrative Law and Procedure (Key) 763

In determining whether a regulation is arbitrary and capricious, scope of review is narrow: reviewing court's task is limited to determining whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

4. Aliens (Key) 44

Deference is accorded an agency's setting of wage rates.

5. Aliens (Key) 44

In regard to setting wage rates, deference is accorded an agency's choice of one set of data over another.

6. Aliens (Key) 44

United States Department of Labor has "broad discretion" to set adverse effect wage rates for agricultural workers in accordance with any of a number of reasonable formulas.

7. Aliens (Key) 44

In regard to the United States Department of Labor's setting adverse effect wage rates for agricultural workers, the base AEWRs built up over several years prior to 1981 were reasonable.

8. Aliens (Key) 44

In regard to the United States Department of Labor's setting adverse effect wage rates for agricultural workers, an AEWR methodology is reasonable if it produces results comparable to those produced by other potential methodologies.

9. Aliens (Key) 44

Because the United States Department of Labor and the Secretary thereof have broad discretion in setting adverse effect wage rates for agricultural workers, because the base AEWRs built up over several years prior to 1981 were reasonable, and because the DOL and its Secretary considered the relevant factors during rule-making pro-

ceeding the 1983 AEWRs were rationally based and the decision to use ES-202 data was reasonable, particularly as compared to the use of USDA data; therefore, the AEWR regulation, 20 C.F.R. § 655.207(b), as amended on August 31, 1983, was not arbitrary and capricious.

10. Aliens (Key) 44

In regard to agricultural employment, the United States Department of Labor's piece-rate regulation, 20 C.F.R. § 655.207(c), as amended on August 31, 1983, was invalid because the DOL and its Secretary failed to provide adequate notice and opportunity to comment upon use of the adjective "U.S." in the regulation.

Edward Tuddenham, Migrant Legal Action Program, Washington, D.C., Garry Geffert, West Virginia Legal Services Plan, Martinsburg, W.V., for Ramirez, et al.

Fisher & Phillips, Ft. Lauderdale, Fla., Charles Kelso, Fisher & Phillips, Ann Margaret Pointer, Atlanta, Ga., for Florida Fruit & Vegetable Ass'n, et al.

Michael Kimmel, Mark B. Stern, Dept. of Justice, Washington, D.C., for Dept. of Labor.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and HATCHETT, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

[1-10] In the appeal by plaintiffs the judgment of the district court is affirmed on the basis of the district court's findings of fact and conclusions of law incorporated

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

in its Order made and entered on March 19, 1984, a copy of which is made an appendix to this opinion.

The separate appeal of the defendants-intervenors relating only to the district court's conclusion of law 10 and Paragraph (4) of its Order is dismissed as moot by reason of the Department of Labor's adoption of a new piece rate regulation. 50 Fed.Reg. 25705 (June 21, 1985).

The judgment of the district court is therefore

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WEST PALM BEACH DIVISION

FLORIDA FRUIT & VEGETABLE ASSOCIATION, UNITED STATES SUGAR CORPORATION and SOUTH BAY GROWERS, INC., Plaintiffs,

v.

RAYMOND J. DONOVAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and UNITED STATES DEPARTMENT OF LABOR, Defendants.

Civil Action No. 83-8470-CIV JAG

ORDER

Upon consideration of the parties' cross-motions for summary judgment, the memoranda concerning the motions, the administrative record, and the arguments presented on January 26, 1984, this Court orders that each motion is granted in part and denied in part. After setting forth the findings of fact and conclusions of law upon

which this order is based, this Court will direct entry of judgment.

FINDINGS OF FACT

1. Plaintiffs are Florida Fruit and Vegetable Association (FFVA), United States Sugar Corporation (U.S. Sugar), and South Bay Growers, Inc. (South Bay). FFVA, a Florida association with its headquarters in Orlando, Florida, and an office in Palm Beach County, Florida, acts as agent of a number of Florida sugar cane growers in recruiting domestic cane cutters and in applying for certification under the applicable federal statutes and regulations for the admission of temporary foreign cane cutters. Members of FFVA includes Atlantic Sugar Association, Cane Contractors, Inc., Gulf & Western Products Company, Osceola Farms Company, Shawnee Farms, Sugar Cane Growers Cooperative of Florida, and Sugar Cane Harvesting, Inc., all of which conduct sugar cane agricultural operations in Palm Beach, Glades, and Hendry Counties, Florida. U.S. Sugar, a Delaware Corporation, has headquarters in Hendry County, Florida, and conducts sugar cane agricultural operations in Palm Beach, Glades, and Hendry Counties, Florida. U.S. Sugar annually recruits and hires domestic cane cutters and applies for certification under the applicable federal statutes and regulations for the admission of temporary foreign cane cutters. Plaintiff South Bay Growers, Inc. ("South Bay"), a Florida Corporation, has headquarters in South Bay, Palm Beach County, and conducts agricultural operations in Palm Beach County. South Bay has recruited domestic lettuce cutter crews and applied for certification under the applicable federal statutes and regulations for admission of temporary foreign workers. Amended Complaint, ¶¶ 7-9.

2. Defendant, the Honorable Raymond J. Donovan, is the Secretary of the United States Department of Labor, and is sued in his official capacity. Defendant United States Department of Labor (DOL) is an executive department of the United States. Amended Complaint, ¶¶ 11-12.

3. Plaintiffs brought this action in September, 1983, seeking invalidation of 20 C.F.R. §§ 655.207(b) and (c) as amended by defendants on August 31, 1983, at 48 Fed. Reg. 40168 (Sept. 2, 1983). Plaintiffs have asserted that subpart (b) is arbitrary and capricious in violation of one section of the Administrative Procedure Act (APA), 5 U.S.C. § 706. They have asserted that subpart (c) is procedurally defective for failure to provide adequate notice and opportunity to comment upon the final rule. Amended Complaint, *passim*.

4. As amended on August 31, 1983, subpart (b) of Section 655.207, captioned "Adverse effect rates," provides:

> (b)(1) For agricultural employment (except sheepherding) in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the year previous) in the ES-202 report's aggregate average weekly wage rates for the appropriate group of agricultural workers. The appropriate group of workers shall be those U.S. agricultural workers employed by establishments in Standard Industrial Classification (SIC) Code Nos. 013, 016, 017, 019, 071, and 072 within that State (except that for purposes of wage movement), but not actual adverse effect rates,

New York, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont shall be considered as one State, and Maryland, Virginia, and West Virginia shall be considered as one State). The Administrator shall publish, in each calendar year, on a date he shall determine, adverse effect rates calculated pursuant to this paragraph (b) as a notice in the *Federal Register.*

(2) *List of States.* Arizona, Colorado, Connecticut, Florida (other than sugar cane work), Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Texas, Vermont, Virginia, and West Virginia. Other States may be added as appropriate.

(3) *Transition.* Notwithstanding paragraph (b) (1) and (2) of this section, the 1983 adverse effect rate shall be computed by adjusting the 1981 adverse effect rate by the percentage change in appropriate ES-202 average weekly wages from 1980 to 1982. The adverse effect rate for a State, set by this paragraph (b), shall be the highest of the rate computed by this methodology in paragraph (b) or the rate applied in the State in 1981 or 1982. Pursuant to the Order in *NAACP, Jefferson County Branch v. Donovan,* Civil Action No. 82-2315 (D.D.C. June 28, 1983), the 1982 adverse effect rate for West Virginia was $4.24.

48 Fed.Reg. 40168, 40175 (Sept. 2, 1983). The 1983 adverse effect rates set by defendants for the enumerated states are:

State	AEWR
Arizona	$4.22
Colorado	(1)
Connecticut	4.05

Florida (sugar cane only)	5.37
Florida (except sugar cane)	4.34
Maine	4.15
Maryland	4.38
Massachusetts	4.05
New Hampshire	4.34
New York	4.20
Rhode Island	4.05
Texas	4.16
Vermont	4.28
Virginia	4.39
West Virginia	4.24

[1]Not yet available.

Id. at 40170.

Subpart (c), as amended on August 31, 1983, provides:

(c) *Piece rate adjustments.* In any year in which the applicable adverse effect rate increases to the point where the employer's previous year's piece rate in a crop activity will not enable the average U.S. worker's hourly earnings to equal or exceed the new applicable adverse effect rate without requiring the average U.S. worker to increase productivity over the previous year, the employer shall increase the piece rate to a level at which the average U.S. worker would earn at least the adverse effect rates. If, at the employer's previous year's piece rate for that crop activity, the average U.S. worker's hourly earnings equalled or exceeded the adverse effect rate, no adjustment to that piece rate would be required. The Regional Administrator shall determine the average U.S. worker's hourly earnings by obtaining from em-

ployers in the area of intended employment information as to the piece rates, earnings, hours worked, and productivity of U.S. workers, in a manner to be determined by the Administrator.

5. An extensive and undisputed administrative record with regard to the rulemaking proceeding during which subparts (b) and (c) were amended was provided to this Court by defendants and reflects that:

(a) DOL has for decades set wage rates which growers must agree to pay domestic field workers before DOL will certify that the admission of aliens to work in the growers' fields will not adversely effect the wages and working conditions of U.S. workers similarly employed, *see* 48 Fed.Reg. 33684 (July 22, 1983) and 48 Fed.Reg. 40168;

(b) between 1975 and 1981 for Florida sugar cane and between 1968 and 1981 for other states and crops, DOL computed adverse effect wage rates (AEWRs) by adjusting the previous year's rates by the same percentage as the annual percentage change (from the second preceding year to the preceding year) in average wage rates for field and livestock workers as reflected by survey data of the United States Department of Agriculture (USDA), *see id.;*

(c) the USDA in the spring of 1981 ceased conducting quarterly surveys of wages paid to field and livestock workers and instead began conducting in 1982 one annual survey of wages paid to such workers during one week in July, *see id.;*

(d) because of the USDA's having discontinued its quarterly surveys, DOL refrained from calculating 1982 AEWRs until ordered by a federal district court to set

such rates for the states of West Virginia, Florida, Vermont, and Maine, *see id.;*

(e) during the rulemaking proceeding conducted to set the 1982 AEWRs, the USDA indicated to DOL that there were flaws in using data from USDA's one-week per year survey to measure trends in agricultural wages, 48 Fed.Reg. 40172, *see* 82R29;

(f) on July 19, 1983, DOL proposed to use certain ES-202 data collected by DOL's Bureau of Labor Statistics to calculate the percentage increases in the AEWRs from 1981 to 1983, 48 Fed.Reg. 33684;

(g) the ES-202 data reflect both the total wages paid every three months and the number of domestic workers employed on the 12th of each month by United States agricultural concerns having a quarterly payroll in excess of $20,000 or employing 10 or more domestic workers, and thus encompass the wages paid to at least 40 percent of domestic agricultural workers, *id.* at 33685, 48 Fed.Reg. 40171(4);

(h) numerous growers, including plaintiffs submitted comments to DOL that the July USDA data, not the ES-202 data, should be used to calculate the percentage increases in the AEWRs from 1981 to 1983, 83R 113-202; the USDA commented that USDA rather than ES-202 data should be used but also that it knew of no data totally appropriate for use in measuring wage trends of domestic farm workers, 83R 203; charts appended to the comments of U.S. Sugar and USDA reflect that the AEWRs set using ES-202 data are very similar to the ones which the USDA data would have yielded, 83R 178 and 203;

(i) representatives of some farm workers submitted comments advocating use of the ES-202 data, 83R 75-81;

(j) after considering the comments, defendants concluded that they would use ES-202 data to calculate the increases in the AEWRs from 1981 to 1983 because, among other reasons, the ES-202 fairly measured trends in agricultural wages and the alternative July USDA data entirely missed the fall and winter sugar cane and apple-harvest seasons, 48 Fed.Reg. 40170-72;

(k) the piece-rate rule proposed on July 19, 1983 did not include the adjective "U.S." between the words "average" and "worker" as they relate to the productivity portion of the piece-rate formula, 48 Fed.Reg. 33687; and

(l) the final piece-rate rule added the adjective "U.S." between the words "average" and "worker" as they relate to the productivity portion of the piece-rate formula, 48 Fed.Reg. 40175.

CONCLUSIONS OF LAW

[1] 1. "The summary judgment procedure is particularly appropriate in cases in which the court is asked to review . . . a decision of a federal administrative agency." Wright, Miller & Kane, *Federal Practice And Procedure*: Civil 2d § 2733, Vol. 10A at 366 (1983).

[2] 2. Summary judgment is appropriate in this case because, in reviewing an agency rulemaking, the court considers the record that was before the agency, and that record is before the court. *E.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971); *Ryder Truck Lines, Inc. v. United States,* 716 F.2d 1369, 1378 (11th Cir.1983).

[3] 3. In determining whether a regulation is arbitrary and capricious, the scope of review is narrow: a reviewing court's "task is limited to determining 'whether

the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' [citations omitted]. *Ryder Truck Lines, Inc. v. United States, supra,* 716 F.2d at 1378.

[4] 4. Deference is accorded an agency's setting of rates. *E.g., Building & Construction Trades' Dept., AFL-CIO v. Donovan,* 712 F.2d 611, 619 (D.C.Cir.1983), *cert. denied,* ..... U.S. ....., 104 S.Ct. 975, 79 L.Ed.2d 213 (1984); *United States v. FCC,* 707 F.2d 610, 618 (D.D.C. 1983); *Hercules, Inc. v. EPA,* 598 F.2d 91, 106-07 (D.D.C. 1978). *See Permian Basin Area Rate Cases,* 390 U.S. 747, 800, 88 S.Ct. 1344, 1377, 20 L.Ed.2d 312 (1968).

[5] 5. Deference is also accorded an agency's choice of one set of data over another. *E.g., National Ass'n of Metal Finishers v. EPA,* 719 F.2d 624, 657 (3rd Cir.1983); *State of Connecticut v. EPA,* 696 F.2d 147, 159-60 (2d Cir. 1982); *Citizens Against Refinery's Effects v. EPA,* 643 F.2d 178, 182 (4th Cir.1981).

[6] 6. DOL has "broad discretion" to set AEWRs in accordance with "any of a number of reasonable formulas. . . ." *Florida Sugar Cane League, Inc. v. Usery,* 531 F.2d 299, 303-04 (5th Cir.1976). *Accord, Rowland v. Marshall,* 650 F.2d 28 (4th Cir.1981) (per curiam); *Williams v. Usery,* 531 F.2d 305 (5th Cir.), *cert. denied,* 429 U.S. 1000, 97 S.Ct. 527, 50 L.Ed.2d 610 (1976); *Dona Ana County Farm & Livestock Bureau, Inc. v. Goldberg,* 200 F.Supp. 210 (D.D.C.1961). *See generally* K. Davis, *Administrative Law Treatise* § 29.01-02 at 287-88 (1980 Supp.).

[7] 7. The base AEWRs built up over several years prior to 1981 are reasonable. *Rowland, supra,* 650 F.2d at 30; *Williams, supra,* 531 F.2d at 307; *Florida Sugar Cane, supra,* 531 F.2d at 302-04; *Dona Ana, supra,* 200 F.Supp. at 213-16.

[8] 8. An AEWR methodology is reasonable if it "produced results comparable to those produced by the other potential methodologies." *Rowland v. Marshall, supra,* 650 F.2d at 30 n. 3.

[9] 9. Because of defendants' broad discretion in setting AEWRs, because the base AEWRs have been upheld as reasonable, and because defendants considered the relevant factors during the rulemaking proceeding, the 1983 AEWRs are rationally based and the decision to use ES-202 data is reasonable, particularly as compared to the use of the USDA data; therefore, the AEWR regulation, 20 C.F.R. § 655.207(b), as amended on August 31, 1983, is not arbitrary and capricious.

[10] 10. The piece-rate regulation, 20 C.F.R. § 655.207(c), as amended on August 31, 1983, is invalid because defendants failed to provide adequate notice and opportunity to comment upon the use of the adjective "U.S." in the regulation.

Accordingly, it is, therefore,

ORDERED AND ADJUDGED that:

(1) Defendants' Motion for Summary Judgment is granted with respect to the AEWR methodology issue raised by revisions to 20 C.F.R. § 655.207(b). Defendants may determine AEWRs utilizing ES-202 data in the historical formula.

(2) The Court having determined that the Secretary's final order and the comments published with it satisfy the APA requirements as to the AEWR methodology, Plaintiffs alternatively requested a trial date. This Motion for a trial to challenge the actions behind the Secretary's published comments is denied. The Plaintiffs' Renewed Motion for Full Trial of Factual Issues is likewise

denied. It is inappropriate for the Court to substitute its judgment for that of the Secretary when faced with such conflicting facts and opinions.

(3) For sixty days subsequent to entry of this Order and throughout the period of appeal if an appeal is filed, DOL remains restrained an enjoined from refusing to issue "labor certification" pursuant to 20 C.F.R. Part 655 for the temporary employment of aliens to harvest Plaintiffs' crops, provided that the escrow account previously established remains posted in the nature of a supersedeas bond and provided that Plaintiffs qualify in all other respects for the issuance of such labor certifications.

(4) Plaintiffs' Motion for Summary Judgment is granted with respect to the "U.S." worker issue raised by revisions in 20 C.F.R. § 655.207(c). The six references to "U.S." as a modifier to average worker are hereby deleted. The Final Rule as modified, which is exactly as it was proposed, is a valid final rule.

This Order constitutes the final judgment of this Court.

DONE AND ORDERED in chambers in Fort Lauderdale, Florida, this 19th day of March, 1984.

/s/ Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

VIRGINIA AGRICULTURAL
GROWERS ASSOCIATION,
INC., et al., Plaintiffs,

v.

Raymond J. DONOVAN, Secretary of
Labor, et al., Defendants,

and

Sherman and Debra Paulk,
Defendants-Intervenors.

FREDERICK COUNTY FRUIT
GROWERS ASSOCIATION,
INC., et al., Plaintiffs,

v.

Raymond J. DONOVAN, Secretary
of Labor, et al.,

and

Cedrick Turner, Vincent Clark, and
Gene R. Reeder, et al.,
Defendants-Intervenors.

Civ. A. Nos. 83-0146-D. 83-0147-D.

United States District Court,
W.D. Virginia,
Danville Division.
Aug. 22, 1984.

Associations of agricultural producers brought action to invalidate Department of Labor regulation establishing a methodology for setting hourly agricultural adverse effect wage rates. The District Court, Kiser, J., held that

regulation was arbitrary and capricious as record did not disclose how agency acted in selecting instant methodology over alternative methodology, the chosen methodology was an invalid measure of the AEWR, data generated by the methodology was untimely and agency apparently did not sufficiently consider comments submitted.

Judgment for plaintiff.

1. Administrative Law and Procedure (Key) 749

Under the arbitrary-and-capricious standard, agency action is presumed valid. 5 U.S.C.A. §§ 706, 706(2)(A).

2. Administrative Law and Procedure (Key) 760, 790

Reviewing court is not permitted to substitute its judgment for that of the agency, but it must make a substantial inquiry into the facts to insure that the agency demonstrates a rational connection between the facts found and the choice made. 5 U.S.C.A. §§ 706, 706(2)(A).

3. Administrative Law and Procedure (Key) 788

Validity of agency action must be sustainable on the administrative record made. 5 U.S.C.A. §§ 706, 706(2)(A).

4. Administrative Law and Procedure (Key) 676

Although a court is not to undertake de novo review of agency action, neither is it realistic or wise to "straightjacket" the reviewing court with the administrative record in all situations. 5 U.S.C.A. §§ 706, 706(2)(A).

5. Aliens (Key) 44

There was no rational basis for Department of Labor regulation establishing methodology for setting hourly agricultural adverse effect wage rates for the 1983 harvest as there was no evidence that agency tested the chosen methodology against others and studied its consequences

and effects, the chosen methodology was an invalid measure of the adverse effect of wage rates as wage rates were derived from annual earnings, agency did not analyze effect if including nonagricultural workers in its data base and the data was untimely as it would be unavailable at time an adverse effect was likely to occur and there were indications agency did not sufficiently consider the comments submitted. Immigration and Nationality Act, §§ 101(a) (15) (H) (ii), 214(c), 8 U.S.C.A. §§ 1101(a)(15) (H)(ii), 1184(c); 5 U.S.C.A. §§ 706, 706(2)(A).

Albert D. Misler, Morris Kletzkin, S. Steven Karalekas, Washington, D.C., W. Carrington Thompson, Clement & Wheatley, Danville, Va., William A. Johnston, Harrison & Johnston, Winchester, Va., for plaintiffs.

Dale M. Wiley, Va. Legal Aid Soc., Inc., Danville, Va., Edward J. Tuddenham, Inc., Migrant Legal Action Prog., Washington, D.C., Robert N. Moore, Farmworker Unit, Pine Tree Legal Assistance, Bangor, Maine, Robert Willis, NC Farm Worker's Legal Services, Raleigh, N.C., of counsel, for defendants-intervenors.

Thomas R. King, Jr., Asst. U.S. Atty., Roanoke, Va., Arthur Goldberg, Robert Damus, Dept. of Justice, Federal Programs Branch, Civil Div., Washington, D.C., for defendants.

MEMORANDUM OPINION

KISER, District Judge.

Plaintiff, Virginia Agricultural Growers Association, Inc. ("VAGA"), is an incorporated association of agricultural producers consisting primarily of tobacco growers located in Virginia. VAGA's sole place of business is in

South Boston, Virginia. Plaintiff Frederick County Fruit Growers Association, Inc. ("FCFGA"), is a Virginia corporation with headquarters in Winchester, Virginia. FCFGA has 67 members who are small apple growers operating in Frederick County and surrounding counties in the Commonwealth of Virginia. The remaining Plaintiffs are cooperative associations whose members are apple growers located in the states of Maryland and New York. All Plaintiffs in these two consolidated actions employ significant numbers of domestic and temporary foreign farmworkers.

Defendant, Raymond J. Donovan, is the Secretary of the United States Department of Labor. Defendant United States Department of Labor ("DOL") is an executive department of the United States. Defendant-Intervenors are Cedrick Turner, Vincent Clark, Gene R. Reeder and Sherman and Debra Paulk, all of whom are domestic, migrant seasonal farmworkers.

These actions arise under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii) and 8 U.S.C. § 1184(c) and the regulations promulgated thereunder, including 8 C.F.R. § 214.2(h)(3) (1983) and 20 C.F.R. §§ 655.0 through 655.212 (1983). DOL is responsible for the issuance of labor certifications pursuant to these statutes and regulations in the operation of the temporary foreign labor program (hereinafter referred to as the "H-2 program").[1] These cases also arise under the review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982).

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1. *See Virginia Agr. Growers Ass'n, Inc. v. Donovan,* 579 F.Supp. 768 (W.D.Va.1984).

I.

Plaintiffs brought this action in September, 1983, seeking invalidation of 20 C.F.R. § 655.207(b) as amended by Defendants on August 31, 1983, at 48 Fed.Reg. 40,168 (Sept. 2, 1983). Plaintiffs have asserted that subpart (b) is arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706.

As amended on August 31, 1983, subpart (b) of Section 655.207, captioned "Adverse effect rates," provides:

> (b)(1) For agricultural employment (except sheepherding) in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the year previous) in the ES-202 report's aggregate average weekly wage rates for the appropriate group of agricultural workers. The appropriate group of workers shall be those U.S. agricultural workers employed by establishments in Standard Industrial Classification (SIC) Code Nos. 013, 016, 017, 019, 071 and 072 within that State (except that for purposes of age movement, but not actual adverse effect rates, New York, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont shall be considered as one State, and Maryland, Virginia, and West Virginia shall be considered as one State). The Administrator shall publish, in each calendar year, on a date he shall determine, adverse effect rates calculated pursuant to the paragraph (b) as a notice in the *Federal Register*.
>
> (2) *List of States.* Arizona, Colorado, Connecticut, Florida (other than sugar cane work), Maine,

Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Texas, Vermont, Virginia, and West Virginia. Other States may be added as appropriate.

(3) *Transition.* Notwithstanding paragraph (b) (1) and (2) of this section, the 1983 adverse effect rate shall be computed by adjusting the 1981 adverse effect rate by the percentage change in appropriate ES-202 average weekly wages from 1980 to 1982. The adverse effect rate for a State, set by this paragraph (b), shall be the highest of the rate computed by this methodology in paragraph (b) or the rate applied in the State in 1981 or 1982. Pursuant to the Order in *NAACP, Jefferson County Branch v. Donovan,* Civil Action No. 82-2315 [566 F.Supp. 1202] (D.D. C. June 28, 1983), the 1982 adverse effect rate for West Virginia was $4.24.

48 Fed.Reg. 40,168, 40,175 (Sept. 2, 1983).[2]

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2. The 1983 adverse effect rates set by Defendants for the enumerated states are:

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State	AEWR
Arizona	$4.22
Colorado	(1)
Connecticut	4.05
Florida (sugar cane only)	5.37
Florida (except sugar cane)	4.34
Maine	4.15
Maryland	4.38
Massachusetts	4.05
New Hampshire	4.34
New York	4.20
Rhode Island	4.05
Texas	4.16
Vermont	4.28
Virginia	4.39
West Virginia	4.24

[1]Not yet available.

Id. at 40170.

The administrative action that is being challenged by Plaintiffs began when DOL published a Notice of Proposed Rulemaking in the Federal Register on July 22, 1983, 48 Fed.Reg. 33,684, pursuant to an order of the United States District Court for the District of Columbia in *NAACP, Jefferson County Branch v. Donovan,* 566 F.Supp. 1202 (D.D.C.1983), that required the DOL to establish a methodology for setting hourly agricultural adverse effect wage rates (AEWR) for the 1983 harvest season, and to publish those rates no later than July 29, 1983. *See* 48 Fed.Reg 33,684.

The AEWR is a minimum hourly wage guarantee intended to neutralize any "adverse effect" on domestic workers occasioned by the employment of temporary foreign workers. DOL's authority to establish the AEWR is limited to establishing a wage rate necessary to preclude an "adverse effect" on the wages of similarly employed domestic workers. *See* 20 C.F.R. § 655.207. DOL has for decades set wage rates which growers must agree to pay domestic field workers before DOL will certify that the admission of aliens to work in the growers' field will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 48 Fed.Reg. 33,684 (July 22, 1983) and 48 Fed.Reg. 40,168. Between 1968 and 1981 for most states and crops (and between 1975 and 1981 for Florida sugar cane), DOL computed adverse effect rates by adjusting the previous year's rates by the same percentage change as the annual percentage change (from the second preceding year to the preceding year) in average work rates for field and livestock workers as reflected by survey data of the United States Department of Agriculture (USDA) *Id.*

In April 1981, the USDA ceased conducting quarterly surveys of wages paid to field and livestock workers, and

instead began conducting one annual survey of wages paid to such workers during one week in July. The first such annual survey was conducted in July, 1982. Farmworkers in four states sued DOL objecting to DOL's failure either to devise a new AEWR methodology or to set individual AEWRs for 1982. That litigation resulted in a court order requiring DOL to establish a new AEWR methodology and to set AEWRs for 1982 for the four states involved in that litigation (Maine, Vermont, Florida, and West Virginia). *Bragg v. Donovan,* No. 82-2361 (D.D. C. August 23, 1982). In response, DOL calculated a 1982 AEWR limited to the states involved in the suit and extended the 1981 AEWR into 1982 for all other states.[3]

DOL's continued failure to devise a new methodology for indexing AEWRs generally resulted in a second court order in another proceeding. *NAACP, Jefferson County Branch v. Donovan,* 566 F.Supp. 1202 (D.D.C.1983). Because more than two years had passed since USDA announced the curtailment of its quarterly survey, and because during that period DOL had failed to act, a second court order was issued giving DOL until July 29, 1983, to propose a methodology for setting AEWRs for the 1983 harvest season for all states in which H-2 workers would be employed.[4]

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3. DOL calculated the 1982 AEWRs by extrapolating from the January and April, 1981 USDA quarterly survey statistics. 48 Fed.Reg. 235 (January 4, 1983).

4. In its opinion, the District Court commented on DOL's inaction:

> On April 7, 1983 defendants submitted a memorandum to apprise the Court of DOL's intentions in setting AERs. The memorandum stated that DOL was considering a 3-step process for establishing AERs that would be ready for application by 1985. Additionally, defendants stated that action was being taken to promulgate 1983 AERs for all affected

(Continued on following page)

On July 22, 1983, in response to the court order in the *NAACP* case, DOL published a notice of proposed rulemaking which set forth for the first time the ES-202-based AEWR methodology. 48 Fed.Reg. 33,684 (July 22, 1983). This rule proposed to index the AEWR by the percentage change in the annual average weekly earnings statistic derived from the ES-202 program. Thus, to determine the 1984 AEWR for a particular state, DOL would apply the percentage change in the average weekly earnings statistic between 1982 and 1983 to the existing 1983 AEWR for that state. 48 Fed.Reg. 40,170 (September 2, 1983). Each year's average weekly earnings statistic is estimated from the data collected by the ES-202 program.

The ES-202 data are reported to state employment security agencies by those agricultural employers who are covered by unemployment insurance. All covered employers are required by law to file these reports. Since 1978, all agricultural firms employing at least 10 workers in 20 weeks or having a $20,000 quarterly payroll, are covered by unemployment insurance. Each state agency receives quarterly reports from each covered employer reflecting both the total wages paid every three months

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Footnote continued—

states. However, on June 6, 1983, shortly before issuing this opinion, the Court requested an update on what progress, if any, DOL had made toward accomplishing its stated intentions. Defendants' response disclosed that nothing of substance had been done during this time. Moreover, DOL stated that action on 1983 AERs was being deferred pending issuance of this opinion. This lack of progress by DOL in carrying out its statutory mandate further underscores the importance of the Court's declaring DOL's obligation to establish annual AERs now. It makes clear that if the Court found that this controversy was not yet ripe, it would be but a short while before plaintiffs had to return to the Court seeking this same relief.

NAACP, Jefferson County Branch v. Donovan, 566 F.Supp. 1202, 1207 n. 6 (D.D.C.1983).

and the number of domestic workers employed on the 12th of each month by that employer. The state agencies, in turn, report this data to Bureau of Labor Statistics (BLS). 48 Fed.Reg. 33,685. The data collected by the ES-202 program are grouped according to Standard Industrial Classification ("SIC") Codes. For purposes of indexing the AEWR, data from the following six (6) three-digit SIC codes are used: 013 (field crops), 016 (vegetables and melons), 017 (fruit and tree nuts), 019 (general farms), 071 (soil preparation services), and 072 (crop services). 48 Fed.Reg. 40,169 (September 2, 1983).

DOL received a total of 206 comments on its proposed rule. Comments were received from congressional sources, farmworker representatives, employers, employer representatives, and federal, state, and county agencies. *See* Administrative Record, submitted with DOL's first Motion for Summary Judgment (December 8, 1983) ("Administrative Record"). The overwhelming majority of the comments criticized the proposed methodology. *Id.* The United States Sugar Corporation, among others, submitted with its comments a report prepared by Dr. James S. Holt, dated August 18, 1983. (Holt Report I).[5] Dr. Holt's report analyzed the proposed ES-202 methodology and concluded that such methodology was totally inappropriate to index AEWRs as (i) the year-to-year movements in annual *earnings* produced by the ES-202 program is an inappropriate measure of year-to-year movements in hourly *wage rates* needed to set the AEWR; (ii) the ES-202 data base itself is inappropriate in that it is not representative of agricultural employment generally, does not measure "similarly employed" workers, and the data is not subject to

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5. Dr. Holt and his associate, L. Burton, also submitted a second analysis of this rule with Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Holt II).

adequate quality control; and (iii) the methodology has computational and methodological flaws including the untimeliness of the data and the possibility of completely artificial statistical results.

Representatives of some farm workers submitted comments advocating use of the ES-202 data. Growers submitted comments to DOL stating that the July USDA data, not the ES-202 data, should be used to calculate the percentage increases in the AEWRs from 1981 to 1983. The USDA commented that USDA rather than ES-202 data should be used, or that some totally new survey should be conducted to gather data.

On September 2, 1983, DOL published a final rulemaking which adopted the ES-202-based AEWR indexing methodology as originally proposed, with only minor modification. 40 Fed.Reg. 40,168 (September 2, 1983).

II.

The Plaintiffs substantively attack the AEWR regulation as having no rational basis, and that, therefore, DOL's action was "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).

[1-3] The applicable standard of review, § 706(2)(A) of the APA, provides:

> . . . that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law . . .

Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). This standard is a highly deferential one. It presumes agency action to be valid. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814,

28 L.Ed.2d 136 (1971). This is not to say, however, that the Court must rubber-stamp the agency decision as correct. To do so would render the review process superflous. *Ethyl Corp. v. Environmental Protection Agency,* 541 F.2d 1, 34 (D.C.Cir.1976). Therefore, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, supra.* Although the Court is not permitted to substitute its judgment for that of the agency, it must make a substantial inquiry into the facts to insure that the agency demonstrates a rational connection between the facts found and the choice made. *Id., see also United States Lines, Inc. v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir.1978). Furthermore, the validity of the agency's action must be sustainable on the administrative record made. *Camp v. Pitts, supra,* 411 U.S. at 143, 93 S.Ct. at 1244; *Almay, Inc. v. Califano,* 569 F.2d 674, 681 (D.C.Cir.1977).

[4, 5] Although this Court is not to undertake *de novo* review of this agency action, neither is it realistic or wise to " 'straightjacket' the reviewing court, with the administrative record" in all situations. *Asarco, Inc. v. United States E.P.A.,* 616 F.2d 1153 (9th Cir.1980). As the court in *Asarco, Inc., supra,* held:

> If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision.
>
> . . . . .

> It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. *Id.* at 1160.

DOL maintained that there should not have been a trial in this matter. However, I believe that the trial was necessary in order to determine whether DOL considered all relevant factors and in order to discharge properly my duty to engage in "substantial inquiry" as to whether the process employed by DOL to reach its decision took into consideration all the relevant factors. With this limited scope of review in mind, I have searched the rulemaking record and considered other background information and can find no rational basis for the regulation for three primary reasons.

A.

DOL has stipulated that the public record which was filed with its Motion for Summary Judgment on December 8, 1983, constitutes the entire administrative record relied on by DOL as the basis for promulgation of the September 2, 1983, AEWR rule. The administrative record contains (i) the proposed and final rules for 1982, 47 Fed.Reg. 52,198-99 (November 19, 1982) and 48 Fed.Reg. 234-35 (January 4, 1983), and 29 comments received by DOL, and (ii) the proposed and final rules for 1983, 48 Fed.Reg. 33,684-87 (July 22, 1983) and 48 Fed.Reg. 40,168-75 (September 2, 1983) and 206 comments received by DOL and DOL's responses thereto. The record as it stands contains no studies, no analysis, no memoranda and no empiracal evaluation of the ES-202 methodology, or any

other methodology studied by DOL. In short, from the record, I cannot determine why DOL chose this method.

It is clear from the record itself that DOL was notified in 1981 that the USDA was no longer going to publish quarterly rates and thus a new methodology would need to be established. Painfully clear, too, is the fact that DOL simply sat on its hands until Judge Richey ordered DOL to publish new AEWRs no later than July 29, 1983. Any "time constraints" placed on DOL in adopting a new method were self-imposed by DOL's own failure to act quickly when notified of USDA's plan to move from quarterly to yearly surveys. "[A]n order . . . . to consider a matter expeditiously is not a mandate to be arbitrary, capricious, irrational or sloppy . . ." *Puerto Rico Maritime Authority v. Federal Maritime Commission*, 678 F.2d 327, 336 (D.C. Cir.), *cert. denied*, 459 U.S. 906, 103 S.Ct. 210, 74 L.Ed.2d 167 (1982) (referring to time constraint placed on agency by order of Congress).

Dr. Leo Polopolus, an agricultural economist and witness for the Plaintiffs, indicated that in early 1981 when DOL first knew a change would have to be made, DOL had many alternatives which could have been developed or which existed. These include (i) the prevailing wage rate survey data; (ii) use of a stratified random sample of employers in affected states and affected commodities; and (iii) use of the annual USDA data. It is not my duty to select one of these methodologies over the ES-202 data. However, when the record is essentially bare as to the agency inquiry, its analysis, and its reasoning in selecting the ES-202 data, I must conclude that such a decision does not constitute reasoned decision-making.

DOL argues that it has "broad discretion" to set AEWRs in accordance with "any number of reasonable

formulas . . . ." *Florida Sugar Cane League, Inc. v. Usery,* 531 F.2d 299, 303-04 (5th Cir.1976); *Rowland v. Marshall,* 650 F.2d 28 (4th Cir.1981). In *Rowland v. Marshall, supra,* the Fourth Circuit, however, pointed out that:

> There is ample evidence in the record to support [the] conclusion [that the methodology used to calculate the AEWR is not arbitrary and capricious], including evidence that the Department of Labor reviewed the AEWR methodology in 1977 by testing it against other possible methodologies. Using the various methodologies studied in 1977 with the 1980 data, the Department of Labor found that the AEWR methodology currently used produced results comparable to those produced by the other potential methodologies. *Rowland v. Marshall, supra* at 30 n. 3.

Although DOL does have discretion to choose among reasonable formulas, there simply is no evidence in the administrative record before me that DOL tested this methodology against others and studied its consequences and effects. The ES-202 methodology was simply published, and there is just not one iota of information in the record which clearly and adequately discloses the grounds upon which DOL acted in selecting this methodology. The paucity of any reasoning in support of the ES-202 methodology over some other alternative indicates to me that DOL had chosen this method prior to receiving public comment to satisfy the Court's Order in the *NAACP* case and that the public comment process was simply a formalistic exercise.

B.

Secondly, a most troublesome aspect of the ES-202 methodology is that it is an invalid measure of the AEWR.

In Holt Reports I and II and in his testimony at trial, Dr. Holt identified and explained in detail seven crucial defects in the ES-202 methodology. After his own analysis of the ES-202 methodology and of Dr. Holt's work criticizing that methodology, Dr. Polopolus, a second agricultural economist, agreed with each of the seven defects in the ES-202 methodology identified by Dr. Holt and with Dr. Holt's overall conclusion that the ES-202 program data provides an invalid mechanism for indexing changes in AEWRs. Dr. Jerome M. Staller, an economist and witness for Defendant-Intervenors', also generally concurred with Dr. Holt's criticisms of the ES-202-based AEWR methodology.[6]

Dr. Holt's first criticism of DOL's ES-202 methodology is fundamental to the methodology itself: The average weekly earnings statistic derived from the data collected by the ES-202 program is a totally inappropriate proxy for calculating changes in the AEWR, which by definition is an hourly wage rate standard. DOL admits that the ES-202 program produces no hourly wage data.

The regulation would annually adjust the AEWR by the percentage change in an estimate of average weekly earnings. Average weekly earnings are estimated in the rule by dividing total annual payroll by an estimate of annual work weeks of employment aggregated over the relevant SIC classifications. Thus the DOL rule indexes an hourly wage rate by year-to-year movements in an estimate of average weekly earnings.

Dr. Holt indicated that a change in hourly wage rates is only *one* of the factors influencing year-to-year changes in annual earnings and the average weekly earnings fig-

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6. Dr. Staller's main area of disagreement with Dr. Holt was that he (Staller) felt the weekly wage movement was a substantially accurate measure of hourly earnings movement.

ure estimated from that figure. Year-to-year changes in average weekly earnings can and do commonly occur in agriculture for reasons wholly unrelated to changes in hourly compensation rates. These reasons include variations in crop size, in the length of the work week, and the length of the season, variations in productivity, changes in labor supply and/or labor management practices, and changes in the composition of the agricultural work force.

Because year-to-year changes in per employee annual earnings of seasonal agricultural workers are likely to be influenced far more by changes in the amount of employment than by changes in hourly wage rates, and the year-to-year movements in average weekly earnings produced by the ES-202 data for the six three-digit SIC codes used to index the AEWRs are highly erratic. *See* Plaintiffs' Trial Exhibit 7; Holt Report I, at p. 7; Holt Report II, at p. 26.

In its commentary accompanying the final rulemaking DOL attempted to counter the criticism that factors causing changes in average weekly earnings are unrelated to changes in compensation rates and result in independent movements in average weekly earnings and average hourly wages over the same time period. DOL asserted that "it is anticipated that these factors would cancel each other out . . . and that over time productivity and earnings would change at a steady rate." 48 Fed.Reg. 40,170 (September 2, 1983). According to Dr. Holt, this assertion is neither true nor relevant for three reasons: (i) the AEWR is not a measure of productivity or earnings; (ii) the ES-202 data used in indexing the AEWR show no evidence of "cancelling out" overtime; and (iii) since the AEWR is changed from one year to the next year (and a grower employing H-2 labor must pay each year's AEWR for that year), the overall cumulative change in the yearly statistic used to measure the AEWR is meaningless.

A further criticism presented by Dr. Holt was that the six three-digit SIC codes used to index the AEWR contain significant amounts of non-agricultural employment. *See* Holt Report I, at pp. 15-19; Holt Report II, at pp. 32-35; Tr. at 70-81 (Holt).[7] Examples of such employment include non-production employees, such as bookkeepers and supervisors. According to Dr. Holt the inclusion of such employment undermines the usefulness of the ES-202 data in measuring characteristics of "similar employment". In addition, wage movements of non-agricultural workers are likely influenced by different factors than those of agricultural workers.

In the commentary accompanying its final rulemaking, DOL stated that inclusion of non-similarly employed workers in the ES-202 data base did not "significantly affect" the outcome of the new AEWR methodology because "DOL has not been persuaded" that wages of agricultural workers move differently from the wages of non-agricultural workers. 48 Fed.Reg. 40,171 (September 2, 1983). It is clear from the record, however, that prior to issuing the final rule, DOL performed no analysis of the effect of the inclusion of non-agricultural workers in the ES-202 data base on the validity of the methodology.

Another criticism leveled by Dr. Holt was in the notice of proposed rulemaking DOL cited uses of the ES-202 data by other agencies as a justification for the proposed methodology. 48 Fed.Reg. 33,684 (July 22, 1983).[8]

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7. *See also* USDA Secretary John Block's Comments as to this defect. Administrative Record, Document 203.

8. *See also* Administrative Record, Document No. 189 (Comments on the National Council of Agricultural Employers); Document No. 191 (Comments of Agricultural Producers, Valencia, California); Document No. 202 (Comments of Florida Sugar Institute); Document No. 203 (Comments of Secretary John R. Block, USDA).

Public comments on the proposed rule disclosed that the other agency uses of ES-202 data cited by DOL were not related to the manner in which DOL proposed to use the ES-202 data. Those comments also noted that major users of ES-202 data specifically excluded the agricultural ES-202 data.

In publishing the final rule, DOL responded to the criticism that the other uses of the ES-202 data cited by DOL as justification for use of that data to index the AEWR were in fact irrelevant to the proposed methodology by stating that "[w]hile the agricultural portion of the ES-202 data series has not yet attained as wide currency as other portions of the data series, this is in part due to the relatively recent unemployment compensation coverage of agricultural workers." 48 Fed.Reg. 40,170 (September 2, 1983). In the final rule, DOL repeated these same uses of the data series in support of its use of the ES-202 data asserting that the "data are recognized by competent statistical authorities as being valid . . ." 48 Fed.Reg. 40,169 (September 2, 1983). However, the record does not reveal that DOL conducted any investigation as to the validity of the commentors' concerns.

A most serious flaw, I feel, is that the data is untimely. The final rule established the following method for determining the AEWR for 1984 and subsequent years:

> The final rule . . . would use the one-year movement from the beginning of the second year previous to the end of the first year previous to set the movement from the prior year's AEWR to the current year's AEWR.

48 Fed.Reg. 40,170 (September 2, 1983). Thus, the 1984 AEWR for a particular state is determined by applying the

percentage change in the annual average weekly earnings statistic between 1982 and 1983 to the existing 1983 AEWR for that state. DOL must have the average weekly earnings statistics produced by the ES-202 data for both 1982 and 1983 in order to determine the 1984 AEWR. Yet, the preliminary uncorrected tabulations of the ES-202 data for 1983 will not be available until September of 1984—the year for which the AEWR is to be used. The same situation will recur in all subsequent years in which the ES-202 methodology is used to make annual AEWR adjustments.

Recruitment for the planting, cultivation and harvesting of tobacco and cabbage begins in January of each year. These crops are worked between April and September. Apple harvesting recruitment typically begins in July and continues through early September. Apple harvesting begins in early to mid-September. So by September, recruitment for apple, tobacco and cabbage agricultural work is finished and the cabbage and tobacco seasons are virtually over.

The AEWR purports to ensure against any "adverse effect" to "similarly employed" domestic workers which would otherwise be produced by employment of temporary foreign workers. *See* 8 C.F.R. § 214.2(h)(3). An AEWR based on ES-202 data simply cannot prevent an adverse effect, and, therefore, achieve the result for which it is purportedly designed, since it is unavailable at the time when an adverse effect is likely to occur—during the recruitment and hiring of farm workers.

The record before the Court demonstrates that the ES-202 data needed to promulgate the AEWR for a given year is not available to DOL until September of the year for which the AEWR is to be promulgated. The ES-202

data is not available when needed and the ES-202 methodology, therefore, is not a reasonable method for determining the AEWR.

This methodology was also criticized by USDA Secretary, John Block, who stated that "the ES-202 program data are inappropriate for determining annual changes in the AEWRs." *See* Administrative Record Document 203 at p. 1. More specifically, Secretary Block explained that (i) the ES-202 data does not cover small agricultural employers (except in six jurisdictions) and only 40 percent of the workers in United States agriculture are represented in the ES-202 data; (ii) although DOL lists several ways that ES-202 program data are use for other purposes as a means of justifying their use to compute annual changes in the AEWRs, for the most part the cited uses of this data use only non-agricultural ES-202 data; and (iii) the proposed rule would adjust the AEWRs on the basis of changes in the estimated average weekly wages (not hourly wages) of all types of workers employed on farms covered by unemployment insurance—an average weekly wage is an inappropriate indicator of hourly wage rates, which is what the AEWR is supposed to measure. *Id.* at p. 2-3.

The comments of Secretary Block further suggested that to ensure an objective and reliable computation of H-2 wage rates, "an appropriate new data series and a totally new methodology must be developed." As a stop gap measure only, Secretary Block recommended that DOL use the wage data from the USDA July farm labor surveys to compute the 1983 AEWRs. *Id.* at p. 4.

It is apparent that the criticisms of Drs. Holt, Polopolus and Secretary Block point out serious deficiencies in the statistical validity of using the ES-202 data series to cal-

culate annual changes in the AEWRs. Although DOL responded to most of these comments in the publication of the final rule, in my opinion this does not bolster the validity of this methodology so as to ratify the actions of DOL in establishing a methodology that simply does not measure what it is supposed to measure. This methodology is inappropriate and a new methodology must be established. It is clear that DOL realizes this for in the final rulemaking the agency seems to justify the final rule by indicating that:

> This rulemaking meets the critical need, created by the recent Orders in *NAACP, Jefferson County Branch v. Donovan,* and the impending 1983 harvest season, to set AEWRs for 1983 and does not foreclose a determination by DOL to institute in later years other changes in the AEWR regulations. 48 Fed.Reg. 40,173 (September 2, 1983)

Although it is clear that DOL has the authority to make changes in the AEWR, this self-serving declaration indicates, as did Mr. Richard Gilliland (Director, United States Employment Service, under whose direction the final rule was developed) at trial that the ES-202 methodology is simply a stop gap measure.[9] In my opinion, such a choice by DOL represents a clear error of judgment.

C.

Finally, there are indications that the Secretary did not in fact sufficiently consider the comments which were submitted to the proposed rule. The proposed rule was

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9. At trial, Mr. Gilliland stated that DOL will request suggestions for methodologies for future years because it is the intent of DOL to return in 1982 to the USDA quarterly survey if such survey is reinstated. Trial Tr. at 371.

published on July 22, 1983, and originally written comments were to have been received by August 5, 1983—a mere 10 business days later. As many commentators pointed out to DOL, there was no way a proper analysis of the true impact of the proposed regulations could be made in such a short time. The DOL did extend the comment period through August 22, 1983—another 2 weeks. This still is a very short time to sufficiently comment on such a technical regulation.

The final rule was published on September 2, 1983, just 11 days (8 business days) after the close of the comment period in which over two hundred comments were submitted. Common sense dictates that proper consideration could not have taken place in that brief span, and indeed the administrative record reflects that it did not. Cursory responses to comments which point out glaring deficiencies in this data series as a measure of the AEWR does not comply with DOL's responsibility to consider and respond to such comments. The fact is, DOL was under the gun of Judge Richey's court order, selected this methdology with no indication in the administrative record as to how it was selected, and was going to publish this as a final rule regardless of what the commentators submitted. Such action in my opinion is arbitrary and capricious, and the regulation must be overturned.

In conclusion, for the foregoing reasons, I find the regulation at 20 C.F.R. § 655,207(b) as amended by DOL on August 31, 1983, and found at 48 Fed.Reg. 40,168 (September 2, 1983) to be arbitrary and capricious and in violation of 5 U.S.C. § 706.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

ORDER

For the reasons stated in the Memorandum Opinion filed this day, it is hereby ADJUDGED and ORDERED that:

1. The regulation promulgated by the Department of Labor at 20 C.F.R. § 655.207(b) as amended by DOL on August 31, 1983, and found at 48 Fed.Reg. 40,168 (September 2, 1983) is arbitrary and capricious and in violation of 5 U.S.C. § 706.

2. The Secretary of Labor shall promulgate an Adverse Effect Wage Rate for the year 1983 pursuant to the rule making provision of the Administrative Procedure Act and consistent with the Court's Opinion filed this date.

The Clerk is directed to send certified copies of this Order to all counsel of record.